

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION CASE NO. 5:09-cv-00244-KSF

filed electronically

C. MARTIN GASKELL

PLAINTIFF

V.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

UNIVERSITY OF KENTUCKY

DEFENDANT

** ** *

Comes the Defendant, University of Kentucky, by counsel, and for its Memorandum of law in support of its Motion for Summary Judgment, states as follows:

INTRODUCTION

In 2007 the University of Kentucky (UK) opened the MacAdam Observatory on its Lexington campus and sought applications for its Director. Dr. Martin Gaskell applied for the job but was not hired. Instead, the University hired Tim Knauer, a former student and employee of the UK Department of Physics & Astronomy who did not have the same degrees and experience as Gaskell but who demonstrated the qualities that the University wanted in its Observatory Director. Gaskell claims that he was rejected for the Observatory Director job because of his religious beliefs and bases his claim on opinions from some of the faculty in the Physics & Astronomy Department which are based on erroneous assumptions. The Defendant University submits that Gaskell has failed to prove that he was rejected for employment because of his religious beliefs and they are entitled to Judgment as a matter of law.

ISSUES

This case presents the Court with two main issues:

- Gaskell claims UK denied him employment as a result of his religious beliefs. UK has presented substantial evidence that it chose a different candidate for reasons that have nothing to do with Gaskell's religion. Since Gaskell has failed to show by a preponderance of the evidence that UK's reasons were a pretext for discrimination, does *McDonnell Douglas* require dismissal of his case?
- For many years, Gaskell has been giving public lectures on *Modern Astronomy, the Bible, and Creation* and he posted his lecture notes on the internet. Can an employer, who seeks to hire a scientist for a job involving outreach to the public, disqualify an applicant whose views are not scientifically valid, even if those views are shaped by the candidate's religious beliefs?

STATEMENT OF THE CASE

In 2007, UK's Department of Physics and Astronomy opened the MacAdam Student Observatory. The department created the observatory as a place for learning and research to be shared by faculty, students, and the public. UK welcomes the public to the observatory, and hosts a monthly public-outreach program in which it invites anyone to come and learn about astronomy.¹

In the summer of 2007, the department began looking for a director to oversee the observatory's operations and to fulfill the observatory's mission to make astronomy and science more accessible to students and the public at large. It began the search by posting the job on the American Astronomical Society website. (Cavagnero, p. 17-18, 24).² The department chair, Mike Cavagnero, formed an advisory committee to review applications, conduct candidate interviews and make recommendations on who should be hired for the Director position. (Id.).

¹ A link to the observatory's website is available at www.pa.uky.edu/observatory/.

² Exhibit 1, Deposition of Michael Cavagnero (hereinafter "Cavagnero")

UK's job posting announced its intent to establish an observatory with a combination of state and private support, and to hire a founding director to lead the observatory.³ The Director position is a non-faculty, staff level position. The posting described the expected duties of the director which included supervision of teaching assistants; teaching of introductory astronomy courses; maintenance and operation of the telescope and facility; and interaction with students, employees, staff, and the public. (Id.). The educational requirements for the Director included a master's degree in astronomy or an astronomy-related field of study. (Id.)

As the advisory committee began to discuss the nature of the director's role, it decided on a separate list of its own criteria. In large part, these criteria matched the public posting, but added a few items. Cavagnero listed these criteria in an e-mail to the committee to include: (1) management of the physical facility, (2) instruction of students enrolled in astronomy courses AST 191 and AST 192, (3) management of graduate assistants working at the observatory, (4) development of a program of regional outreach geared toward K-12 students, (5) aiding of undergraduate physics/astronomy majors with research projects, (6) pursuit of funding for K-12 teacher education, and (7) pursuit of funding for undergraduate research.⁴ The committee placed particular emphasis on the K-12 outreach criterion because one of the observatory's donors was interested in such outreach projects. (Cavagnero p. 15-16).

Applicants responded to the job posting by completing an online application form. One of those applicants was Martin Gaskell.⁵

Since August 2007, Gaskell had been working as a research scientist at the University of Texas' McDonald Observatory.⁶ At the time he filed his application for Director of UK's

³ Exhibit 2, Job Posting

⁴ Exhibit 3, Cavagnero e-mail dated 8/20/07

⁵ Exhibit 4, Gaskell on-line application

⁶ Exhibit 5, Gaskell CV

Observatory, Gaskell was working in a non-tenured position in the Physics & Astronomy Department at the University of Nebraska at Lincoln (UNL). For most of his employment at UNL, he worked under the terms of a 3-year rolling contract.⁷ (Gaskell, p. 26). The nature of his UNL position mirrored his previous career history. (Gaskell, p. 18-28). While he has sought, and continues to seek tenure-track faculty positions, he has nearly always worked under a limited-term contract. (Gaskell, 18-28; 230).

Gaskell is a native of the United Kingdom. In 1975, he moved to the United States to pursue first a Master's Degree and later a Doctoral Degree at the University of Santa Cruz. (Gaskell, p. 15). He is a professional astronomer with a primary interest in extra-galactic astronomy and, in particular, super-massive black holes and active galactic nuclei. (Gaskell, p. 17). He was paid at UNL as well as at Texas through a NASA research grant.⁸ (Gaskell, p. 10).

Gaskell had some initial reservations about applying for the UK position. He has long sought a tenured-faculty post and the UK observatory job was not a faculty position. (Gaskell, p. 89). He applied even though he would have preferred that the position was a tenured position with a higher salary. (*Id.*). In fact, if the salary range had been much lower, Gaskell would not have applied. (Gaskell, p. 102). Although the UK job posting did not lead him to believe that research was a substantial component of the job, Gaskell planned to bring his research and grant money with him if he was hired for the Director position. (Gaskell, p. 90-91).

As the advisory committee began reviewing applications, Gaskell stood out.⁹ Based on his CV, he appeared to be a leading candidate, possessing many of the qualifications the

⁷ Exhibit 6, Deposition of Martin Gaskell (hereinafter "Gaskell")

⁸ Exhibit 5, Gaskell CV

⁹ Exhibit 7, Cavagnero/Troland e-mail dated 9/5/07

committee sought. (Id.). In his role at UNL, he appeared to have performed many of the things the UK advisory committee expected of its new observatory director. (Id.).

Following its review of the written applications, the advisory committee began conducting phone interviews. Cavagnero and the committee chair, Dr. Tom Troland, conducted the phone interview of Gaskell. (Gaskell, p. 102). The interview covered a variety of topics concerning his qualifications and employment history. (Gaskell, p. 103). Gaskell thought his phone interview was fairly standard. (Id.). Gaskell testified that the entire telephone interview focused exclusively on his interests in astronomy. (Gaskell, p. 106).

Before and after the phone interview, Cavagnero e-mailed Gaskell concerning his application.¹⁰ Cavagnero was particularly interested in Gaskell's Nebraska experience. (Cavagnero, p. 28-29). Cavagnero had spent time at the University of Nebraska working as a post-doctoral fellow, and he was acquainted with Gaskell's supervisor at UNL, Roger Kirby. (Cavagnero, p. 19-20). Cavagnero asked Gaskell if he could contact Professor Kirby.¹¹ Gaskell requested that UK not contact his current employer.¹² Although Cavagnero initially agreed not to contact Gaskell's current employer for a reference, subsequently he learned that Gaskell was leaving Nebraska and was moving on to the University of Texas and thought Gaskell might withdraw his objection to his contacting Kirby.¹³ Gaskell replied that Kirby would not be a good reference.¹⁴ He asked Cavagnero to refrain from speaking with Kirby about Gaskell's tenure at Nebraska, and instead forwarded Cavagnero a copy of his most recent University of Nebraska evaluation.¹⁵ Cavagnero informed the advisory committee of Gaskell's

¹⁰ Exhibit 8, Cavagnero e-mail dated 8/20/07 and Exhibit 9, Cavagnero/Gaskell e-mail dated 8/21/07

¹¹ Exhibit 8, Cavagnero e-mail dated 8/20/07

¹² Exhibit 9, Cavagnero/Gaskell e-mail dated 8/21/07

¹³ Exhibit 8, Cavagnero e-mail dated 8/20/07

¹⁴ Exhibit 9 Cavagnero/Gaskell e-mail dated 8/21/07

¹⁵ Exhibit 9 Cavagnero/Gaskell e-mail dated 8/21/07; Exhibit 10, Kirby letter dated 5/25/06

wishes. (Cavagnero, p. 91). The committee, however, felt that the importance of contacting an applicant's most recent supervisor outweighed the applicant's wishes, at least under the circumstances. (Id.). Since Gaskell was no longer in jeopardy of losing his job at the University of Nebraska, Cavagnero took the liberty of contacting Kirby about Gaskell. (Id.).

Kirby provided Cavagnero quite a bit of information about Gaskell, much of which was positive. (Cavagnero, p. 94). Not all of Kirby's comments were positive, however. Kirby said that Gaskell's main source of conflict with the UNL faculty was his constant desire to decrease his teaching load. (Cavagnero, p. 95). Although Gaskell had been hired to primarily teach, Kirby told Cavagnero that Gaskell applied some of his research funding toward the hiring of an instructor to replace him as a teacher so that he could focus more exclusively on research. (Id.). Kirby was placed in a difficult position of having to hire replacement instructors. (Id.). Kirby also told Cavagnero that Gaskell often refused to accept the decisions of his colleagues and administrators, constantly finding ways to rehash old issues. (Cavagnero, p. 97). Cavagnero shared the details of this conversation with the advisory committee chair, Dr. Tom Troland.¹⁶

During the search process, one of the advisory committee members, Sally Shafer, did a search on the internet for information about Gaskell and found his University of Nebraska web-site which linked to Gaskell's personal web site containing an article which Gaskell titled "Modern Astronomy, the Bible, and Creation".¹⁷ Sally circulated the article to the advisory committee members. Because the article referenced certain religious topics, the members of the advisory committee approached Cavagnero with concerns about whether they could consider Gaskell's statements which appeared to blend religious thought with scientific theory.

¹⁶ Exhibit 11, Cavagnero/Troland e-mail dated 9/19/07

¹⁷ Exhibit 12, Lecture Notes – *Modern Astronomy, the Bible, and Creation*

Gaskell's web site posting was not the first time that some members of the advisory committee became familiar with Gaskell's public statements on the scientific theory of evolution. In 1997, Gaskell had been invited to deliver a talk at UK on *Modern Astronomy, the Bible, and Creation*.¹⁸ One of the astronomers in the UK Physics & Astronomy Department, Moshe Elitzer, did not attend the 1997 lecture but had heard one of his colleagues who did attend, Gary Ferland, comment that Gaskell was a "creationist" and did not hide his beliefs.¹⁹ (Elitzur, p. 9). Elitzur went to Cavagnero and told him about Gaskell's public lecture comments and shared his concern about hiring someone in a position with a significant public outreach component who was a creationist. (*Id.*). Elitzur testified that he told Cavagnero that since the University is 70 miles from a creationist museum, there was no way to avoid publicity if UK hired a creationist for an outreach position. (Elitzur, p. 8).

Gaskell's lecture notes referenced his UNL affiliation and his UNL website linked to his personal web site which included the lecture notes.²⁰ Cavagnero was concerned that if Gaskell did something similar at UK, he would be in violation of one of UK's governing regulations concerning use of one's university position to advance one's private viewpoints. (Cavagnero, p. 99).

In his conversation with Kirby, Cavagnero had asked if Gaskell's personal religious beliefs had interfered with his duties in the classroom and in the community at the University of Nebraska.²¹ Kirby shared that a handful of students had mentioned in their teacher evaluations that it was refreshing to have a professor who believed in God, but that otherwise Gaskell's views on religion had not interfered. (*Id.*). In light of Kirby's statements, Cavagnero concluded

¹⁸ Exhibit 12, Lecture Notes – *Modern Astronomy, the Bible, and Creation*

¹⁹ Exhibit 13, Deposition of Moshe Elitzur (hereinafter "Elitzur")

²⁰ Exhibit 12, Lecture Notes – *Modern Astronomy, the Bible, and Creation*

²¹ Exhibit 11, Cavagnero/Troland e-mail dated 9/19/07

that Gaskell's views on religion and science should not prevent him from being considered for the Director job.²² Nonetheless, Cavagnero thought it prudent to consult with the Dean of the College of Arts and Sciences and with the Provost of the University about whether the advisory committee could consider Gaskell's lecture notes and public statements from his 1997 lecture as part of the hiring process.²³

Steven Hoch was the Dean of the College of Arts and Sciences at UK and in response to Cavagnero's request for advice on how the committee should consider Gaskell's public statements which appeared to blend science and religion, Hoch responded that the committee was not to evaluate Gaskell based on questions of religion but since Gaskell's viewpoint was discussed in a scholarly paper, the committee should consider whether his statements were "good science."²⁴ (Hoch, p. 30-31). The University Provost agreed. (Id).

After consulting with the Dean and the Provost, Cavagnero told the advisory committee that they could consider the scientific integrity of Gaskell's statements from his lecture notes. (Cavagnero, p. 152-53). Since Gaskell's notes discussed biological principles, Cavagnero also decided to consult with some of the University's biology faculty. (Cavagnero, p. 151). Cavagnero contacted Dr. Jeffrey Osborn, one of the faculty members of the UK Biology Department who also was involved with outreach missions of the University. (Id.). Cavagnero thought it was important to have an outreach person evaluate the scientific credibility of the statements in the lecture notes because the observatory director's position also contained a significant outreach component. (Id.). He thought that an outreach person might be better attuned to understanding the public's perception of Gaskell's statements concerning religion and

²² Exhibit 14, Cavagnero e-mail dated 9/21/07

²³ Exhibit 15, Cavagnero e-mail dated 10/1/07

²⁴ Exhibit 16, Deposition of Steven Hoch (hereinafter "Hoch"); See also Exhibit 17, Hoch/Cavagnero e-mails dated 10/1/07 and 10/3/07.

science. (Id.). Specifically, Cavagnero asked Osborn if Gaskell had made scientific statements about evolution that showed a fundamental lack of appreciation for the scientific method and/or for well-established scientific principles.²⁵ (Cavagnero, p. 152).

Osborn solicited input from two of his colleagues, Shelly Steiner who was the chair of the Biology Department, and Jim Krupa, a Biology faculty member.²⁶ (Osborne, p. 14-15). Krupa was familiar with Gaskell because he had attended Gaskell's 1997 lecture and had actually gotten into a debate with Gaskell during the question and answer portion of the lecture.²⁷ (Krupa p. 13-14). Krupa challenged Gaskell's statement in that lecture that there was no or very little evidence for evolution. (Krupa, p. 14). At Osborne's request, Krupa reviewed Gaskell's lecture notes and found statements which Krupa considered unscientific such as "there are significant problems in evolutionary theory". (Krupa p. 27). Krupa is an evolutionary biologist and he testified that there are no significant scientific questions about evolution and that it is a well-established scientific theory. (Krupa p. 35).

Shelly Steiner reviewed Gaskell's lecture notes which included scientific statements about "intelligent design" which in Steiner's opinion, is not "science" because it is not testable.²⁸ (Steiner p. 37). Sheldon had a real problem with considering Gaskell for a scientific position because, "even though a person might be adequate in biology, if they basically believe that the sun revolves around the earth, we wouldn't hire them." (Steiner p. 40).

After getting input from Krupa and Steiner, Osborne sent Cavagnero an e-mail communicating the biologists' concern about Gaskell's lecture notes and their objections to his

²⁵ See also Exhibit 18, Cavagnero e-mail dated 10/4/07

²⁶ Exhibit 19, Deposition of Jeffrey Osborn (hereinafter "Osborn")

²⁷ Exhibit 20, Deposition of Jim Krupa (hereinafter "Krupa")

²⁸ Exhibit 21, Deposition of Sheldon Steiner (hereinafter "Steiner")

candidacy for the Director position.²⁹ Osborne was chiefly concerned with the effect that Gaskell's views on science and religion might have on the University's outreach projects. (Id.). In Osborn's view, Gaskell's lecture notes attempted to start a religious dialogue that distracted from the empirical evidence-based nature of science. (Id.). As a scientist, Osborn thought such an attitude would be counterproductive to the University's outreach efforts. (Id.). More importantly, Osborn found fundamental scientific errors in the lecture notes. (Id.). He first took issue with Gaskell's statement that there were significant scientific problems in evolutionary theory. (Id.). As a bio-scientist, Osborn did not believe there were any "significant scientific problems" with evolutionary theory. (Id.). Osborn cited overwhelming empirical and imbedded evidence for genetic change, which he believed closed any scientific debate on the existence of evolution. (Id.). Secondly, he took issue with Gaskell's views on intelligent design theory. (Id.). He interpreted Gaskell's lecture notes to suggest that intelligent design was not a religious theory, and was supported by empirical evidence. (Id.). Osborn believed that intelligent design was strictly a religious theory, noting that bio-scientists failed to find empirical evidence supporting the intelligent design theory. (Id.). Overall, Osborn was concerned with how the community, and especially K-12 students and teachers, might become confused by Gaskell's casual blending of religion and science. (Id.). Osborn firmly believed that science and religion should be separate within any college of arts and sciences. (Id.).

Before the biologists weighed in on Gaskell's lecture notes, on campus interviews were scheduled with the three finalists for the observatory position which included Gaskell, Tim Knauer and a third candidate, Sykes. On October 10, 2007, Gaskell came to UK for an on-campus interview. (Cavagnero, p. 161). Toward the end of that day, he met with Cavagnero. He and Cavagnero discussed his vision for the Observatory Director's job. (Cavagnero, p. 162-

²⁹ Exhibit 18, Cavagnero e-mail dated 10/4/07 (relevant language starting on p. 2)

64). Cavagnero was the first person at UK to broach the subject of Gaskell's web site posting. (Gaskell p. 120). In the context of discussing the University regulation prohibiting faculty from using their University affiliation when expressing personal views, Cavagnero told Gaskell he had seen his lecture notes on his web site wherein Gaskell identified himself as an employee of UNL. (Cavagnero, p. 164-65). Cavagnero actually read Gaskell the language contained in the university's governing regulation and asked if he would have any difficulty complying with it. (Id.).

To Cavagnero, the issue was one of judgment. He had hoped that Gaskell would understand his concern, and volunteer to remove any institutional affiliation from his personal web sites, including the lecture notes. (Cavagnero, p. 188-89). Instead, Gaskell reacted defensively, telling Cavagnero it was none of his business — that it was his personal thing. (Cavagnero, p. 189). Nonetheless, Gaskell eventually voiced his understanding of the University Guidelines. (Gaskell, p. 129). Cavagnero did not ask Gaskell about his personal religious views at any point during the interview. (Gaskell, p. 142-43). Because Gaskell voiced his understanding of the University Guidelines and agreed to comply with them, Cavagnero concluded that the lecture notes would not be an obstacle to his possible appointment. (Cavagnero, p. 166). If anything, Cavagnero thought Gaskell's unique viewpoints would add diversity to the University. (Id.). Following his interview with Gaskell, Cavagnero instructed the advisory committee that the issues involving Gaskell's lecture notes were no longer a concern, and that they should pick the best director they could find, be it Gaskell or someone else.³⁰ (Cavagnero, p. 166-67).

Besides Cavagnero, Gaskell met with a number of other interested parties during his campus visit. (Gaskell, p. 118-20). He met with several of the advisory committee members,

³⁰ Exhibit 22, Cavagnero e-mail dated 10/11/07

various department professors and faculty members, departmental staff, and even students. (Gaskell, p. 119-20). Gaskell's religion, religious views, personal web site and lecture notes were not discussed during any of these meetings. (Gaskell, p. 120-121).

Gaskell was not the only candidate for the observatory Director job. Cavagnero and the advisory committee interviewed the other finalists for the position, Tim Knauer and Quinn Sykes. Having interviewed the three finalists, the advisory committee felt that each of the candidates brought both positive and negative traits to the job.³¹ The committee also felt that all of the finalists had significant weaknesses, and did not feel that any of the finalists represented the ideal candidate. (Id.).

The advisory committee members included Tom Troland who chaired the committee, Keith MacAdam, Sally Shafer, Moshe Elitzur, Isaac Shlossman, Steve Ellis, Nancy Levenson and Gary Ferland. However, Gary Ferland was on sabbatical in England while the search occurred and was never present for any of the committee meetings or candidate interviews.³² (Ferland, p.8). Levenson was out of the country during the majority of the process.

After the on campus interviews, Cavagnero had not yet advised the committee of the biologists' concerns with Gaskell's lecture notes. (Cavagnero, p. 181). Even without the biologists' input, Cavagnero's impression was that the advisory committee was leaning toward Tim Knauer as its choice to fill the observatory director's position. (Id.). Knauer had had a previous affiliation with UK, and had taught some of the introductory astronomy courses at UK.³³ As an engineer, the committee perceived him to be very capable of handling the observatory-maintenance aspect of the job.³⁴ Noting his overwhelming enthusiasm for the job,

³¹ Exhibit 23, Troland e-mail dated 10/16/07

³² Exhibit 24, Deposition of Gary Ferland (hereinafter "Ferland")

³³ Exhibit 25, Troland e-mail dated 9/24/07

³⁴ Exhibit 26, Chart listing candidates' qualifications

the committee thought he would excel at the outreach component of the job, and grow into the other aspects of the job in which he lacked significant experience.³⁵ Cavagnero believed that the in-person interviews with the candidates had been the deciding factor in the committee's turning toward Knauer. (Cavagnero, p. 182). Before the campus interviews, the committee had ranked Gaskell highly. (*Id.*). Following the interviews, the committee bumped Knauer ahead of Gaskell. (*Id.*).

Tom Troland, heavily favored Gaskell.³⁶ (See, e.g., Troland, p. 78). Sensing the committee's movement toward Knauer, he expressed his dissatisfaction to Cavagnero in an October 19, 2007 e-mail.³⁷ (Cavagnero, p. 185-86). Troland chose to identify the issue some had with Gaskell's public statements on evolution as a "religious issue" and thought it was improper to consider "religious views" that were unrelated to the field of astronomy, even if those religious views constituted bad science. (*Id.*).

Cavagnero disagreed with Troland's characterization of the events. (Cavagnero, p. 186). He thought the committee members had acted professionally and with restraint in considering Gaskell's views. (*Id.*). More importantly, he did not believe the committee preferred Knauer because of any disagreement with Gaskell's "religious" views. (*Id.*). In response to Troland's complaint, Cavagnero outlined his perceptions of each of the committee members' thoughts about the candidates.³⁸ He began by expressing his own viewpoint that while he believed Gaskell was the best astronomer of the group, he did not necessarily believe he was the best candidate for the observatory director's position. (*Id.*). He noted that committee member Sally Shafer did not rank Gaskell first because she felt he was not a good listener, and would not be

³⁵ Exhibit 27, Troland e-mail dated 10/27/07

³⁶ Exhibit 28, Deposition of Tom Troland (hereinafter "Troland")

³⁷ Exhibit 29, Troland e-mail dated 10/19/07

³⁸ Exhibit 30, Cavagnero e-mail dated 10/21/07

able to develop good rapport with K-12 school teachers. (Id.). He thought committee member Steve Ellis did not rank Gaskell first because he felt that because Gaskell had a PhD and was in search of a faculty position, Gaskell would be perennially unhappy taking orders from the faculty as a staff person. (Id.). While Cavagnero acknowledged committee member Isaac Shlossman's concerns about Gaskell's lecture notes, he did not believe Shlossman was concerned about Gaskell's religious views, but rather what he saw as the inevitable consequences of attempting to blend science and religion. (Id.). Finally, Cavagnero noted that the graduate assistants who had interviewed Gaskell ranked him last on their list of candidates because they found him difficult to talk with. (Id.).

As it turned out, Troland wrote the e-mail outlining his concerns about the committee's deliberations in the heat of the moment, over his frustration that the other committee members did not share his high opinion of Gaskell. (Troland, p. 72-74). In his deposition, after explaining that he had sent his e-mail in anger, Troland clarified that he no longer believed the committee acted against Gaskell based on his religious viewpoints. (Troland, p. 81-82). For one thing, he noted that the committee had never discussed Gaskell's religious beliefs. (Troland, p. 82). Troland acknowledged that the only "religious" view the committee ever discussed was Gaskell's public comments on evolution and the possibility that Gaskell held unscientific views on the topic of biological evolution which were contrary to accepted scientific evidence. (Id.). At his deposition, Troland testified that he realized that he had made a hidden assumption that Gaskell's beliefs about evolution were driven by his religious views and that he had no actual knowledge that religion was the reason Gaskell held his particular viewpoint. (Troland, p. 82-83).

In the end, the committee endorsed Knauer for the job. In an October 23, 2007 e-mail, Troland outlined the reasons for the committee's decision, as well as his reasons for his dissenting vote for Gaskell.³⁹ The committee felt that Knauer was the best choice, owing in part to his notable enthusiasm, creativity, and energy despite the fact that he did not have a Ph.D. or the breadth of astronomical research background as Gaskell. (*Id.*). They believed that Knauer would work well with his colleagues, and would grow into all aspects of the job as observatory director. (*Id.*). They saw Knauer as someone who possessed an intuitive understanding of how students learned and as having a good work ethic (this view was based on Knauer's prior employment in the department). (*Id.*). The committee also believed that Knauer had a good understanding of the needs of K-12 teachers. (*Id.*). They thought that Knauer's passion for astronomy and his vision for the observatory's potential would serve him well, and that he would be very successful in the position. (*Id.*). Cavagnero accepted the recommendation of the majority of the committee and communicated this to the Dean who in turn accepted the committee's recommendation. Knauer was offered the job, which he accepted, and began his duties as Observatory Director in November of 2007. Knauer continues to hold serve as the director of the MacAdam Student Observatory to this day. (Cavagnero, p. 205).

Gaskell first filed a complaint with the EEOC charging the University with religious discrimination, and, after six months, was provided a right-to-sue letter.⁴⁰ He filed his complaint in this Court alleging that the University unfairly discriminated against him on the basis of his religion. He based his allegations solely on information he was provided during a Skype internet conference he had with Gary Ferland in early 2008. (Gaskell, p. 161-70). Ferland allegedly told Gaskell that the biologists had blackballed him and prevented his hire based on his religious

³⁹ Exhibit 27, Troland e-mail dated 10/23/07

⁴⁰ Exhibit 31, Notice of Right to Sue

views. (*Id.*). Ferland, however, was not around during the interview process because he was on sabbatical leave at Cambridge University in England throughout this time period. (Troland, p. 15-16). Gaskell testified that he knew Ferland was not present during the hiring process and had formed his impressions from e-mails he received from Tom Troland. (Gaskell, p. 171).

According to the Court's scheduling order, discovery was completed in August of 2010, and this case is now ripe for consideration of Defendant University of Kentucky's Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "[T]he burden on the moving party may be discharged by showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. Once the movant has satisfied this burden, the nonmoving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 257. The nonmoving party cannot rest on mere allegations, but must set forth specific facts through affidavits or other evidence. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884-85 (1990). That is, the nonmoving party must create more than a "meta-physical doubt" that summary judgment should be granted. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The key problem with Gaskell's religious-discrimination charge is that he has failed to rebut UK's showing that it disqualified him as a job candidate for non-religious reasons. In fact, most of UK's reasons have nothing at all to do with religion. And those reasons that do touch on

religion have nothing to do with his religious beliefs — they concern his flawed views of scientific theory, which may or may not be shaped by his religion.

ARGUMENT

I. THERE ARE NO MATERIAL ISSUES OF FACT ON WHETHER GASKELL WAS REJECTED FOR EMPLOYMENT AS OBSERVATORY DIRECTOR ON THE BASIS OF HIS RELIGIOUS BELIEFS.

Gaskell seeks relief under Title VII of the Civil Rights Act of 1964. Among other things, Title VII makes it “an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual ... because of such individual's ... religion.” 42 U.S.C. § 2000e-2. “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.” 42 U.S.C. §2000e(j).

In any Title VII action, the plaintiff carries the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff succeeds in proving a prima facie case, the burden then shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee's rejection.” *Texas Dept. of Comm. Affairs*, 450 U.S. at 252-53 (1981), *citing McDonnell Douglas Corp.*, 411 U.S. 792. Should the defendant carry this burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered were not true reasons but were a pretext for discrimination. *Id.* Hence, the first step in analyzing a plaintiff's discrimination claim begins with the evaluation of the plaintiff's prima facie case.

The elements of a prima facie case of discrimination depend on whether the case “involves a failure to hire, failure to promote, or retaliation.” *Judge v. Marsh*, 649 F. Supp. 770,

779 (D.D.C. 1986), *citing McDonnell Douglas Corp.*, 411 U.S. at 802. To establish a case of religious discrimination for failure to hire, as alleged in Gaskell's complaint, a plaintiff must show that "[he]" belongs to a protected group, that [he] was qualified for and applied for a position, that [he] was considered for and denied the position, and that another individual not a member of the protected class was hired at the time that Plaintiff was rejected. *See Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981).

Gaskell was not the advisory committee's first choice for the job of Observatory Director because another candidate, Tim Knauer, was considered more suitable for the job. Gaskell has presented no competent evidence to suggest otherwise. The only evidence Gaskell can offer in support of his claim of religious discrimination is a series of e-mails from Tom Troland who mischaracterized the committee's consideration of Gaskell's public comments and publication on the theory of evolution as a "religious" issue. This mischaracterization was perpetuated by two other faculty members in the College of Physics and Astronomy, namely Gary Ferland who was out of the country during the search process and Mike Kovash who heard Troland complain about the search process and decided to weigh in on the issue without any knowledge at all of the committees' process or considerations.

Following the in-person interviews, Tim Knauer emerged as the advisory committee's clear favorite. All who interviewed him were impressed by his attitude, enthusiasm, and vision for the job. As an engineer with extensive experience operating and maintaining small telescopes, he fulfilled the job's fundamental requirement — an ability to maintain the observatory and its telescopes. With his management experience in the private business world, he was well positioned to supervise the graduate and teaching assistants working at the observatory. And, perhaps most importantly, he was a known quantity. He had a long affiliation

with UK, and had already taught introductory astronomy courses at the University. Department members recalled his teaching ability fondly. While Gaskell had more research experience, the committee felt Knauer would grow into that aspect of the job. The fact that Gaskell had a Ph.D. in astronomy and Knauer had a Masters degree in Physics was not significant because the job posting only required a Masters level or higher in astronomy or a related field such as physics.

On the other hand, Gaskell, while qualified, had a number of issues recommending against his appointment. Cavagnero, as department chair, worried that Gaskell would prove too expensive. (Cavagnero, p. 19). He was a senior research astronomer who had been in search of a faculty position since he was denied tenure from the University of Michigan where he began his professional career. Gaskell testified that if the advertised salary had been any lower, he wouldn't have applied, indicating that he was expecting a salary at the very top end of the advertised range. Cavagnero worried that Gaskell might not be open to others' ideas about the direction of the facility based on his talk with Gaskell's UNL supervisor, Roger Kirby, who told Cavagnero that Gaskell often refused to accept the decisions of his colleagues and administrators.

The department faculty, and especially Professor Keith MacAdam, who had made a significant private donation to the observatory, had a number of ideas about the direction of the observatory and he had his own concerns about hiring Gaskell as director. MacAdam expressed his concerns:

Someone raised concern that Gaskell's role as director of our observatory, if he were selected, could become confused with his role—his views of religious things in relation to reconciling what is known scientifically about how the world developed and what is represented in the Bible. And we all know here that evolution is a hot topic. It's been one at least since the Scopes trials....The creation museum has just been built at great expense and is often in the news, and we've even seen picture of people standing next to

dinosaurs.... We know it's a hot topic. It's a topic that doesn't have anything to do with astronomy, with the observatory, with science education, at least as we in the Department of Physics & Astronomy in the College of Arts and SciencesWe're starting out a new observatory. We haven't had an observatory at the university for 40, 50 years. Astronomy is an exciting new area. It's in the newspapers. It fascinates people who don't have any other science interests or connections. We see it as a marvelous way to grab the attention of young people and the general public to science. And so Gaskell's positions and his involvement and evidently his enthusiasm creating lengthy web pages and so on, or I would say in our mind, threatened to confuse the establishment of the observatory and the role that we wanted it to play in the university and in the community.”⁴¹ (MacAdam p. 19).

Sally Shafer was concerned about Gaskell as a possible Observatory director because ,

“An outreach director who applies fundamental science processes correctly in some cases and yet incorrectly in other select cases (for the purposes of promoting a nonscientific agenda which he openly promotes on his website, and to which the biologists who do outreach have objected) causes me great concern.”⁴² (Shafer p. 58). Shafer has spent her entire career at UK in science education outreach because of her perception that there is something wrong with the way school-aged children are not learning science. (Shafer p. 40). She has worked to design learning resources for teachers to help them utilize and apply National Science Standards in the classroom by doing activities including collecting data and then drawing conclusions from that data to explain what we know about the natural world. (Shafer p. 43). That kind of outreach is different than what Gaskell had done, which was more focused on opening the Observatory for public viewing nights rather than working with teachers to change the way they teach. (Shafer p. 44). When Sally interviewed Gaskell, she questioned him about the National Science Education Standards and how he might apply them in a learning activity for a teacher. (Shafer p. 85). Not only was Gaskell not familiar with the standards, he could not give her an example of how he

⁴¹ Exhibit 32, Deposition of Keith MacAdam (hereinafter “MacAdam”)

⁴² Exhibit 33, Deposition of Sally Shafer (hereinafter “Shafer”)

might assist teachers. (Id.). Sally concluded that Gaskell had little interest in science education outreach. (Shafer p. 84). Sally felt that the way Gaskell treated science was reflected in his lecture notes. (Shafer p. 58).

The committee also considered the matter of fit. The committee had concerns that Gaskell, a senior-level Ph.D., was not a good fit for the job because he would not be comfortable working in a staff position and taking direction from faculty members who he might perceive to be less qualified. In fact, the majority of interviewers found him to be a poor listener, with very fixed ideas about the position. According to Steve Ellis, a staff member of the Department of Physics & Astronomy who served on the advisory committee,

It was hard to get [Gaskell] to answer the questions specifically. He was obviously more comfortable talking about his agenda and what he wanted to do coming here to the University of Kentucky. In my recollection, I found it very hard to get him pinned down on the particular answers of what he wanted to do—what he could do for us in the venues of both bringing on this new observatory and in the area of outreach, which were the two major considerations for the candidates. So I wasn't able to get answers that specifically answered the questions that I wanted to in that interview.⁴³ (Ellis, pp. 18-19).

By contrast, Knauer impressed the committee with his positive attitude and enthusiasm for the job which the committee felt would serve him well during the start-up phase of the facility and during those occasions when he was conducting outreach projects on behalf of the observatory. Against this backdrop, it is not even clear that Gaskell has made out a prima facie case of discrimination.

For purposes of this Motion the Defendant UK accepts that Gaskell may be a member of a protected class by virtue of his public comments on evolution, that he applied for the position of Observatory Director, that he was qualified for the position (he was, after all, the runner-up

⁴³ Exhibit 34, Deposition of Steve Ellis (hereinafter "Ellis")

for the job), that he was considered for the job, and that he was denied the position. But there is no evidence in the record that Knauer's religious beliefs or his views on evolution were different than Gaskell or more importantly, that the advisory committee members were aware of any differences between the two candidates on the issue. The ONLY evidence in this record which distinguishes Gaskell from Knauer is that Knauer did not make public statements both at lectures he has given or in articles or notes he published on the internet which were considered as unscientific. Without evidence that Knauer holds different "religious beliefs" from Gaskell, Gaskell has failed to establish a prima facie case of religious discrimination.

Even assuming Gaskell has presented a prima facie case, UK has articulated legitimate, nondiscriminatory reasons for its selection of Knauer over Gaskell for Observatory Director. In light of this evidence, Gaskell must prove by a preponderance of the evidence that UK's reasons were a pretext for discrimination.

Gaskell testified that Cavagnero asked him an inappropriate question during his on campus interview. The question focused on the content of his personal websites and his notes on *Modern Astronomy, the Bible, and Creation*. As Cavagnero explained, he was not concerned with any of the religious views expressed by Gaskell but he was concerned about the fact that Gaskell had linked that website to his UNL webpage. Cavagnero dealt with this concern by informing Gaskell about UK's governing regulations. Once Gaskell voiced his understanding of these regulations, Cavagnero considered it a dead issue.

Moreover, the inquiry into Gaskell's personal web pages and lecture notes was legitimate. The webpage contained what the Dean of the College of Arts and Sciences considered a scholarly writing. Even Gaskell admitted that his lecture notes contained scientific commentary, and that it was fair for the university to evaluate the scientific validity of that

commentary. (Gaskell, p. 194). Since Gaskell had linked this writing to his university webpage, lectured on this writing, and distributed it to students, the University had a legitimate concern that Gaskell needed to be aware of UK's governing regulations on such matters.

Presumably, Gaskell will point to a series of e-mails authored by faculty members Tom Troland, Gary Ferland, and Mike Kovash in which they expressed their concern that the advisory committee had hired a less qualified candidate on the basis of Gaskell's beliefs about evolution. For a variety of reasons, these e-mails (and Gaskell's discussions with two of these professors) are not competent evidence. Ferland had no personal knowledge of what was happening in the hiring process. He was on sabbatical at Cambridge University in Cambridge, England. His conclusions about how the committee made its hiring recommendation was based solely on information gleaned from others. He was not present for the committee discussions, and he was not present for the all-important candidate interviews. Although Ferland may have read e-mails from committee members in which Gaskell's public comments and article were addressed as an area of concern, he never spoke to any of the committee members other than Troland about why they made the statements they did or why they voted for Knauer over Gaskell.

As for Troland, even though he was present during the hiring process, he drew assumptions which were not premised on any real evidence that any committee member had a religious bias against Gaskell. More importantly, Troland explained that his conclusions about the hiring process reflected his frustration over the fact that the rest of the committee didn't like his candidate, Gaskell. His e-mails, he explained, were also based on false assumptions about Gaskell's religious beliefs and his fellow committee members' thoughts about those religious beliefs. None of this evidence is admissible. Even if some of it is admissible, it certainly does not satisfy the *McDonnell Douglas*' standard of proof by a "preponderance of the evidence."

In the end, the committee simply preferred Knauer. The personal interviews swung the race in his favor, and this happened before the committee even considered the UK biologists' thoughts on Gaskell's science. *McDonnell Douglas* requires the Court to dismiss Gaskell's claims.

**II. UK IS NOT REQUIRED TO HIRE GASKELL MERELY
BECAUSE HIS FLAWED SCIENTIFIC VIEWS ARE
GROUNDED IN HIS RELIGIOUS BELIEFS.**

Title VII has built in to it a safe harbor for employers. In defining the term "religion," the Act provides an out for employers that are unable to reasonably accommodate a prospective employee's religious practices or beliefs without suffering undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j). In other words, there are certain requirements so fundamental to a particular job that even if a person's religion undermines those requirements, an employer may consider those religious views.

In practice, courts have determined that once an employee meets his or her burden of proving a prima facie case of religious discrimination in employment by showing that the employee (1) holds a sincere religious belief that conflicts with an employment requirement, (2) has informed his employer of the conflict, and (3) was discharged or disciplined for failing to comply with the requirement. *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987). The burden then shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship. *Cooper v Oak Rubber Co.*, 15 F3d 1375, 1378 (6th Cir. 1994). The reasonableness of an accommodation is decided on a case-by-case basis. If the employer's efforts fail to eliminate the religious conflict, then the employer has to establish that it is unable to reasonably accommodate the employee's practices without incurring undue hardship. *Id.*

First and foremost, UK was hiring a scientist to fill the role of its observatory director. It stands to reason that core knowledge of sound scientific theory is intrinsic to that role. If the candidate for a scientist's position held views that are not scientifically valid, even if those erroneous views are grounded in that person's religious beliefs, then the employer can disqualify such a candidate. As one of the biologists, Shelly Steiner, pointed out, the biology department would not have hired a biologist who believed that the Sun revolved around the Earth.⁴⁴ As a further example, if someone's religious beliefs prevented him from driving a car, it seems reasonable for a taxi cab company to reject such a candidate's application to drive a taxi cab.

As noted, for many years, Gaskell has been giving a lecture on *Modern Astronomy, the Bible, and Creation*. In fact, he gave such a talk at UK in 1997. In addition, Gaskell published notes from that lecture on the internet. The majority of the advisory committee perceived basic flaws in Gaskell's thinking and presentation on biologic evolution and intelligent design. Gaskell's public statements led some of the advisory committee members to conclude that Gaskell rejected a well-established and scientifically-valid principle of evolution. (Cavagnero, p. 118). Professor Osborn who is a biologist, and therefore should be considered as someone with the expertise to evaluate Gaskell's comments on evolution and intelligent design, was concerned with the manner in which Gaskell blended science and religion in his lecture notes. He thought that such an attitude would be counterproductive to the University's outreach efforts. He found significant scientific errors in the lecture notes, taking issue with Gaskell's statement that there were significant scientific problems with evolutionary theory and Gaskell's suggestion that intelligent design was not a religious theory but instead was supported by empirical evidence. Osborn testified that bio-scientists have failed to find empirical evidence supporting the intelligent design theory. Overall, Osborn was concerned with how the community, and

⁴⁴ Exhibit 35, Cavagnero e-mail dated 10/17/07

especially K-12 students and teachers, might become confused by Gaskell's casual blending of religion and science.

While it is evident that UK passed on Gaskell, not because of his religious attitudes but because the committee thought Knauer was a better fit, even if this Court were to find material issues of fact about whether Gaskell's religious beliefs played a role in the hiring decision, UK could legally disqualify Gaskell on the grounds that it could not reasonably accommodate his religious beliefs in an outreach position which would allow him to use his affiliation with the University to promote his religious beliefs. The potential that the true mission of the McAdams Observatory would be thwarted by controversy that has nothing to do with astronomy was a legitimate concern and the Defendant University was entitled to hire the individual who it perceived as the best candidate to further that mission. The fact that Gaskell's public comments which may or may not have been premised on his religious convictions were considered in the hiring process does not raise a material issue of fact as to whether Gaskell was the victim of discrimination on the basis of his religion. The University is entitled to Judgment as matter of law.

REQUEST FOR RELIEF

For all of the foregoing reasons, Defendant University of Kentucky respectfully requests that this Court grant summary judgment in this case and dismiss, with prejudice, the claims asserted by Plaintiff Martin Gaskell in this matter.

Respectfully submitted,

BAKER, KRIZ, JENKINS, PREWITT & JONES, PSC

PNC Bank Plaza, Suite 710

200 West Vine Street

Lexington, Kentucky 40507-1620

Telephone: (859) 255-6885, Ext. 114

Facsimile: (859) 253-9709

E-Mail: bkriz@bakerkriz.com

s/BARBARA A. KRIZ

Counsel for Defendant, University of Kentucky

CERTIFICATE OF SERVICE

I hereby certify that on **September 29, 2010**, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Francis J. Manion, Geoffrey R. Surtees and Edward L. White, III.

s/Barbara A. Kriz

Attorney for Defendant

Baker, Kriz, Jenkins, Prewitt & Jones, P.S.C.

200 West Vine Street, Suite 710

Lexington, Kentucky 40507-1620

Telephone: (859) 255-6885, Ext. 114

Facsimile: 859-253-9709

E-mail: bkriz@bakerkriz.com

Counsel for Defendants